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9 UNITED STATES DISTRICT COURT
10 CENTRAL DISTRICT OF CALIFORNIA
11 WESTERN DIVISION

12 Consumer Financial Protection
13 Bureau,

14 Plaintiff,

15 v.

16 D and D Marketing, Inc., d/b/a
17 T3Leads, *et al.*,

18 Defendants.

CASE NO. 2:15-cv-09692-PSG(Ex)

**(consolidated for pretrial purposes with
Case Nos. 2:16-cv-02724-PSG(Ex) and 2:16-
cv-02725-PSG(Ex))**

**JOINT STATUS REPORT ON
MEDIATION AND JOINT BRIEF**

Hon. Philip S. Gutierrez

Scheduling Conference:

Date: August 21, 2017

Time: 2:00 p.m.

Courtroom: 6A

Courthouse: First Street

23 Plaintiff Consumer Financial Protection Bureau (the “Bureau”) and Defendants
24 D and D Marketing d/b/a T3Leads (“T3”), Marina Demirchyan, Grigor Demirchyan,
25 Dmitry Fomichev, and Davit Gasparyan (a/k/a David Gasparyan) (“Defendants” and
26

1 collectively with the Bureau, the “Parties”) hereby provide the following Joint Status
2 Report on Mediation and Joint Brief as ordered by this Court.

3 **Mediation:**

4 Despite extensive efforts by all Parties, mediation was unsuccessful in
5 resolving this matter. Although the Parties have ended formal mediation, the Bureau
6 has agreed with each set of Defendants to continue settlement discussions at this
7 time.

8 **Bureau’s Position on Discovery and Scheduling:**

9
10 The Bureau understood that the Court-ordered meet-and-confer would be a
11 robust discussion between the Parties aimed at providing the Court with either an
12 agreement or a single set of issues in order to help inform a scheduling order. With
13 that understanding, the Bureau urged the Defendants to propose a reasonable
14 schedule to which the Bureau might agree, and, where we disagree, to work towards
15 presenting the Court with a concise joint statement. The Defendants instead peppered
16 the Bureau with specific evidentiary questions for more than an hour, and insisted
17 that the Bureau disclose its precise litigation strategy, and identify all evidence to be
18 used to support a summary judgment motion. The Defendants also insisted on
19 presenting separate statements as was done in May rather than providing the Court
20 with a joint statement identifying issues of disagreement among the Parties.

21 The Bureau attempts herein to provide a concise statement to assist the Court.
22 Further, the Bureau does not oppose the Defendants’ proposed schedule which the
23 Bureau believes to be less aggressive than possible but not unreasonable.

24
25 The primary disagreement seems to be over whether unfair and abusive
26 conduct under the Consumer Financial Protection Act of 2010 (CFPA) is analyzed
27 under an objective or subjective standard. The Bureau contends that it is analyzed

1 under an objective standard. As under the FTC Act, on which the CFPA was
2 modeled, the matter is determined by an analysis of whether conduct “is likely to
3 mislead consumers acting reasonably under the circumstances.” *See FTC v. Gill*, 265
4 F.3d 944, 950. (9th Cir. Sept. 12, 2001). The Defendants believe that the matter is a
5 subjective one, requiring “taking discovery of the consumers, lead generators, lenders
6 and other lead purchasers involved.” Such broad discovery is neither necessary under
7 an objective analysis nor practical in a case like this one with millions of consumer-
8 loan-leads at issue. Courts’ consideration of class-action cases is instructive. District
9 courts in this district have typically held that common questions predominate in class
10 actions involving various states’ consumer protection laws because they all use
11 objective criteria to judge deceptive acts. *See, e.g., Tait v. BSH Home Appliances*
12 *Corp.*, 289 F.R.D. 466, 480 (C.D. Cal. 2012) (“For this reason, district courts in
13 California routinely certify consumer class actions arising from alleged violations of
14 the [California] CLRA, FAL, and UCL.”); *Keegan v. American Honda Motor Corp.*,
15 284 F.R.D. 504, 542 (C.D. Cal. 2012) (finding that California, New York, and
16 Florida consumer protection laws all use objective criteria to determine whether a
17 practice is deceptive). This case may be viewed similarly.

18
19 Contrary to the Defendants’ statement here, the Bureau has not been vague on
20 the damages portion of this case. The Bureau has amended its initial disclosures and
21 filed a “Stipulation Memorializing Plaintiff’s Agreement to Restrict the Scope of
22 Plaintiff’s Claimed Relief” (Dkt. Entry 98). The applicable civil money penalties are
23 statutorily prescribed (*see* 12 U.S.C. § 5565; 12 C.F.R. § 1083.1) and will be based
24 on the number of leads T3 conveyed. Indeed, the Bureau does contend that every lead
25 T3 handled was subject to T3’s illegal conduct. As further described in the
26 Complaint, some leads were the subject of additional illegal conduct in the form of
27 misstatements. Some of those misstatements were stated in the Complaint and others

1 may be uncovered during discovery. All Parties have the same access to produced
 2 documents and, of course, the Defendants have greater knowledge of T3's practices
 3 than does the Bureau. As to disgorgement, the Bureau described its burden in open
 4 court during the last scheduling conference: this case involves non-restitutionary
 5 disgorgement, which requires only a reasonable approximation of ill-gotten gains
 6 upon which the burden shifts to the Defendants to prove unreasonableness. *See, e.g.,*
 7 *SEC v. Aletheia Research & Mgmt.*, CV 12-10692-JFW (RZx), 2015 U.S. Dist.
 8 LEXIS 61576, at *6-7 (C.D. Cal. May 11, 2015). Where, as here, the Defendants'
 9 conduct affected all leads they handled, they both possess the relevant information
 10 already and are subject to disgorgement for all revenues derived from the business
 11 activity.

12
 13 The Parties agree that there may be significant discovery disputes. But, the
 14 Bureau does not believe that should guide the Court's determination of an appropriate
 15 schedule. The Court addressed this issue by referring discovery matters to Judge Eick
 16 for resolution as they arise.

17 Finally, the Bureau does not believe this report is an appropriate vehicle for the
 18 Defendants' supplemental stay-motion arguments. The Bureau will refrain from
 19 similar inappropriate supplementation.

20 **Defendants' Position on Discovery and Scheduling:**

21 Pursuant to this Court's prior order, the Parties met and conferred in person on
 22 August 16, 2017, to discuss whether the Bureau's previously announced plan to file a
 23 summary judgment motion would allow the Parties to agree upon a more tailored
 24 discovery plan.

25 The Bureau generally outlined its position that Defendant T3 employed an
 26 improper business model that was not disclosed adequately to consumers, making
 27

1 every representation given to consumers misleading. The Bureau further opined that
2 T3's business model led to consumers obtaining loans with terms prohibited under
3 state or federal law. The Bureau believes that this conduct represents an unfair and/or
4 abusive practice under the Consumer Financial Protection Act, a finding the Bureau
5 believes the Court will reach using an objective standard that does not depend on
6 facts associated with individual transactions. When asked how the Bureau would
7 prove: (1) the content of representations made to consumers by third parties; (2) the
8 materiality of those representations to consumers; (3) the likelihood that such
9 representations misled consumers; (4) the substantial injury consumers suffered; (5)
10 the absence of countervailing benefits to consumers or competition; (6) the inability
11 of consumers to understand the terms, risks, costs or conditions of their loans; and (7)
12 the inability of consumers to protect their interests, the Bureau opined that while it
13 may provide examples of transactions to demonstrate such elements of the claims
14 alleged, or perhaps statistical surveys involving such transactions, the Bureau did not
15 believe it necessary to present such evidence. When asked what evidence it would
16 present, the Bureau expressed the view that it did not have to reveal its intended proof
17 at this time. The Bureau further opined that factual evidence is likely unnecessary.
18 While the Bureau now analogizes its case to a class action, it fails to acknowledge
19 that the Bureau, and not any appropriate class representative, is the Plaintiff here, and
20 none of the protections attendant to class action certification exists here for such
21 extraordinary remedy.

22 The Bureau further remained vague as to the types of monetary recovery it
23 would ultimately seek, the time period encompassed, and how it intended to prove-up
24 such recovery. While the Bureau continues to pursue disgorgement of revenues and
25 alleged unjust enrichment, it disputes that it will need to prove-up the alleged
26 wrongful transactions from the hundreds of thousands of transactions involved.
27

1 Likewise, while the Bureau continues to pursue statutory penalties of \$1,087,450 *per*
2 *day* for alleged knowing violations of the Act, the Bureau continues to ignore the
3 necessary discovery that will be required for evidence that the Court is statutorily
4 required to take into account on the severity of the risks and losses to consumers, and
5 the gravity of the purported violations. 12 U.S.C. § 5565(c)(3).

6 Defendants believe that determining whether a practice is either unfair or
7 abusive under the Consumer Financial Protection Act is intrinsically factual. In
8 discovery, the Bureau must identify all acts it claims have led to the violations it
9 alleges (*e.g.*, specific misrepresentations, illegal loan terms, consumer confusion,
10 consumer harm). Defendants intend to test those allegations by taking discovery of
11 the consumers, lead generators, lenders and other lead purchasers involved. To the
12 extent the Bureau relies on statistical evidence and sampling, Defendants intend to
13 take discovery to understand the nature of the consumer population about which the
14 Bureau seeks to draw its statistical conclusions. Along with discovery of consumers,
15 lead generators, lenders and other lead purchasers, Defendants will further need to
16 take discovery of the Bureau itself, to prove that the acts it claims are unfair or
17 abusive do not meet the criteria Congress established for defining unfair or abusive
18 practices. Defendants will also need substantial discovery from consumers and
19 lenders regarding the injury purportedly suffered by consumers.

20 As the above suggests, the Bureau's articulation of its claims and the relief it is
21 seeking remain quite broad and extensive, involving hundreds of thousands of
22 consumer transactions; thousands of third-party lead generators, lenders, other lead
23 purchasers and vendors; an expansive time period; thousands of potential alleged
24 misrepresentations; and untold number of loan forms, fees and rates. Third parties,
25 and not the Defendants, continue to hold a substantial volume of the documents
26 related to the Bureau's claims, along with the testimony that the Bureau will need to
27

1 prove its claims. Extensive expert discovery will also be necessary to rebut the
 2 Bureau's statistical analysis that the alleged consumer transactions were unfair and/or
 3 abusive. Given the continuing broad nature of the Bureau's claims and the extensive
 4 relief it is seeking, Defendants continue to require discovery on the following
 5 subjects, within the scope of allowable discovery, with the timeline for Defendants'
 6 proposed schedule set forth in the table below:

- 7 • Documents, testimony and witness statements obtained during the
- 8 Bureau's prior investigations;
- 9 • Each transaction, consumer, lead generator, lead purchaser and lender
- 10 allegedly involved in any violations of the Act;
- 11 • Communications between consumers and lenders, prospective lenders,
- 12 and other lead purchasers;
- 13 • Credit histories and loans obtained by alleged affected consumers;
- 14 • Each loan made to alleged affected consumers, as well as the fees and
- 15 interest paid on those loans;
- 16 • Each representation made to the alleged affected consumers that serve as
- 17 the basis of the Bureau's claims;
- 18 • Conduct of actual or prospective lead generators, lead purchasers,
- 19 lenders, vendors, and "business partners and associates" to the extent the
- 20 Bureau claims such conduct forms a basis of, or evidences, Defendants'
- 21 alleged violation of the Consumer Financial Protection Act;
- 22 • The Bureau's deliberations and actions to define relevant conduct as
- 23 "unfair" or "abusive," including its efforts to consult with other federal
- 24 agencies in doing so;
- 25 • Evidence the Bureau claims serve as a basis for the monetary penalties
- 26 being sought by it; and
- 27 • Testifying expert witnesses and their submissions upon which the other
- 28 Party may rely.

23 Additionally, discovery to date has consistently been disputed given the
 24 novelty of the Bureau's claims, its attempts to obtain information protected by the
 25 First Amendment or privilege, and the Bureau's refusal to fully disclose its materials.
 26 Defendants anticipate significant discovery-related motion practice given the lack of
 27 precedent on these matters.

Understanding, however, the Court's encouragement for the Parties to set an aggressive discovery schedule, Defendants propose the following dates:

Event	Defendants' Proposal
Deadline to Complete Fact Discovery, including Depositions	July 9, 2018
Deadline to Disclose Expert Witnesses Under Rule 26(a)(2) and Produce Expert Reports	August 20, 2018
Deadline to Disclose Rebuttal Expert Witnesses and Produce Rebuttal Expert Reports	September 21, 2018
Deadline to Complete Expert Discovery	November 19, 2018
Deadline for Filing Motions, including Dispositive Motions (each party expects to file a motion under Rule 56)	December 28, 2018

Given the extensive breadth and scope of the Bureau's claims and the relief that it continues to seek, the discovery that is necessary, and recognizing that a decision on consolidation for trial has not been made, nor has the Bureau provided sufficient reason for doing so, Defendants continue to believe that a decision on trial dates and their length should be postponed until after the conclusion of discovery.

Finally, Defendants respectfully encourage the Court to stay discovery for the reasons stated in their briefs in support of the pending Motion to Stay Case Pending Disposition of Appeal. [Dkt. Nos. 90; 97; 101; 112; 131; and 145] . Such stays are routinely granted in cases in which a circuit court, like the Ninth Circuit here, has granted a petition for interlocutory appeal pursuant to Section 1292(b). The Bureau

1 has not demonstrated any basis to believe these matters represent outlier cases that
2 the Court should allow to undermine the Ninth Circuit's decision that an appellate
3 court ruling on specific legal issues could avoid the waste of judicial and party
4 resources.

5 T3's conduct at issue in this case does not threaten immediate harm to
6 consumers. T3 is a technology company that efficiently links, through the internet,
7 consumers who seek products or services, here small dollar loans, with persons who
8 provide those products or services, here lenders who provide small dollar loans. T3
9 does not provide any financial products or loans. The Bureau has brought this case in
10 substantial part because Native American Indian tribes participate in seeking
11 consumer leads conducted on T3's platform and the Bureau takes issue with the
12 lending practices of those tribes. The loans made by the tribes based on leads
13 obtained through T3 represent an insignificant portion of the loans made by tribal
14 lenders, and any injunction issued in this case will not have any material effect on the
15 lending done by the Indian tribes. Moreover, the Bureau has not deemed such tribal
16 lending practices a sufficiently immediate threat to consumers to issue rules
17 regarding tribal lending, bring enforcement actions against the vast majority of the
18 tribes undertaking such practices, or encourage Congress to pass laws regarding the
19 tribal practices to which the Bureau takes issue. Simply put, there is no need for this
20 case to proceed before the disposition of Defendants' appeal on threshold
21 constitutional issues, or if discovery does proceed, to do so on an unfairly expedited
22 or truncated schedule.

23 ///

24
25
26 ///

1 Dated: August 17, 2017

2 Respectfully submitted,

3 Consumer Financial Protection Bureau Soltman, Levitt, Flaherty & Wattles LLP

4 /s/ Barry Reiferson

5 Barry Reiferson (*pro hac vice*)

6 Attorney for Plaintiff,

7 Consumer Financial Protection Bureau

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Gasparyan

16
17 **Attestation Pursuant To Local Rule 5-4.3.4**

18 I attest that all other signatories listed, and on whose behalf the filing is submitted,
19 concur in the filing's content and have authorized the filing of this document.

20 REED SMITH LLP

21 /s/ Raffi Kassabian

22 Raffi Kassabian